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June 28, 1988

The Honorable Reid Ewing
Arizona State Representative
State Capitol - House Wing
Phoenix, Arizona 85007

Ms. Anna Ochoa Thorne
Structural Pest Control Board
2207 S. 48th Street, Suite M
Tempe, Arizona 85282

Re: 188-073 (R88-085)

Dear Representative Ewing and Ms. Ochoa Thorne:

Each of you has asked several questions concerning the Governor's power to remove members of the Structural Pest Control Board ("Board"). Specifically, we have been asked the following questions:

1. May the Governor remove Board members?
2. Is cause required to remove Board members?
3. What constitutes cause?
4. Do the acts disclosed in an independent investigation report constitute cause?
5. Does loss of public confidence in the Board or ineffectiveness in the performance of Board members' duties constitute cause?

The answer to your first two questions is that the Governor has the authority to remove members of the Structural Pest Control Board, but only for cause.

The Honorable Reid Ewing
June 28, 1988
I88-073
Page 2

A.R.S. § 32-2302(A) establishes the Structural Pest Control Board, consisting of five members appointed by the Governor. A.R.S. § 32-2302(B) sets the terms of office for Board members at five years.

In Ahearn v. Bailey,^{1/} involving an attempted legislative removal of Industrial Commission members, the Arizona Supreme Court concluded that the Governor, as chief executive officer, has the power to remove executive branch board members. In that case, the court stated:

The Governor is charged with the duty of taking care that the laws are faithfully executed. He must, therefore, have the power to select subordinates and to remove them if

^{1/}In Ahearn v. Bailey the Arizona Supreme Court held that the Legislature did not have the power to remove three board members by abolishing the board and reconstituting essentially the same board with five members because this encroached on the executive power to appoint and remove executive officers. The Court stated that offices could be abolished by the legislature in the following three ways:

First, if an office is abolished and no substitute created, the office may be so abolished whatever may be the reason for its abolishment. Second, if the Legislature abolishes two or more offices with substantially the same duties or different duties and combines the duties under one office by a different name or even the same name for the reasons of economy or genuine reorganization, the abolishment is permissible. Third, if in the abolishment of an office, a new office is created which has substantially new, different or additional functions, duties or powers so that it is an office different from the one abolished even though it also embraces all of the duties of the old office, it will be considered a proper abolishment of the old.

Ahearn v. Bailey, 104 Ariz. 250, 255, 451 P.2d 30, 35.

The Honorable Reid Ewing
June 28, 1988
I88-073
Page 3

they are unfaithful. Accordingly, we conclude that the power to remove is an executive function

Ahearn v. Bailey, 104 Ariz. 250, 253, 451 P.2d 30, 33 (1969) (emphasis added). Because members of the Structural Pest Control Board are appointed by the Governor, it is that officer who has the power to remove them.

Turning to the question whether cause for removal is required, we must interpret A.R.S. § 38-295(A) which states:

Every officer whose term is not fixed by law shall hold office at the pleasure of the appointing power.

"In determining legislative intent that which is necessarily implied in a statute is as much a part of it as that expressed" Police Pension Board of the City of Phoenix v. Warren, 97 Ariz. 180, 185, 398 P.2d 892, 895 (1965). It follows that those whose terms are fixed by law do not serve at the pleasure of the Governor and are entitled to serve the entire term to which they were appointed unless removed for cause. See Ariz. Atty. Gen. Op. 186-059.

Because the terms of office for members of the Structural Pest Control Board are fixed by law, Board members do not serve at the pleasure of the Governor. Accordingly, a member of this Board may be removed before his term expires only for cause.

Your third question is, "What constitutes cause?" Arizona's common law definition of "for cause" is found in Farish v. Young, where the Arizona Supreme Court stated:

"The phrase 'for cause' does not mean the arbitrary will of the appointing power, for that might be the outgrowth of mere whim, caprice, prejudice, or passion, which would, in reality, be no cause at all. But the phrase 'for cause' must mean some cause affecting or concerning the ability or fitness of the incumbent to perform the duty imposed upon him. 'The cause must be one affecting

The Honorable Reid Ewing
June 28, 1988
I88-073
Page 4

the officer's capacity or fitness for the office.' Hence it must be inefficiency, incompetency, or other kindred disqualification"

18 Ariz. 298, 302, 158 P. 845, 847 (1916), quoting Board v. Williams, 96 Md. 232, 53 A. 923, 925 (1903) (emphasis added) (citations omitted). The Governor has discretion to determine if the questioned conduct is an "other kindred disqualification" because:

[w]here the word "cause" is not defined by law, it is left in the first instance to the [appointing power] to determine what is sufficient cause to justify the removal, but that this power may be honestly, fairly and reasonably exercised and not through caprice or prejudice, the courts will exercise the power of review.

Farish v. Young, 18 Ariz. 298, 303, 158 P. 845, 847 (1916) (emphasis added) (citation omitted).^{2/}

Accordingly, when the Governor has the exclusive power to appoint an officer for a fixed term, cause for removal is

^{2/}In Holmes v. Osborn, 57 Ariz. 522, 539, 115 P.2d 775, 783 (1941), the Arizona Supreme Court discussed the limitations or what constitutes cause when an appointment must be approved by the Senate:

In the creation of new offices by the legislature that body may empower the governor to make appointments thereto, with the advice and consent of the senate, or it may give him alone that power with the right of removal. When the appointment is to be approved by the senate, the governor may not remove except in the manner and for the cause or causes named by the legislature.

Because A.R.S. § 23-2302 does not require Board appointments to be approved by the Senate, the Governor may remove members for causes other than those named exclusively by the legislature.

The Honorable Reid Ewing
June 28, 1988
I88-073
Page 5

incapacity or unfitness in performing the duty imposed because of incompetency, inefficiency, or other conduct that is determined by the Governor to be sufficient to justify removal.

Your fourth question regarding disclosures by an independent investigator concerns a question of fact. The Attorney General is authorized only to issue opinions on questions of law. A.R.S. § 41-193(A)(7). Therefore, we express no opinion with respect to factual matters. Ariz. Atty. Gen. Op. 180-231. Because the Governor has the authority and discretion to determine whether there is cause for removal, the Attorney General will defer to the Governor to make that determination.

With respect to the first part of Mr. Ewing's last question, concerning whether "loss of public confidence" would constitute cause, the answer would depend upon the particular conduct that spawned the lack of confidence. The focus of the inquiry must be on the board member's "ability or fitness" to perform the duties of the office. Farish v. Young, 18 Ariz. at 302, 158 P. at 847.

The second part of Mr. Ewing's final question is whether "ineffectiveness in the performance of their duties" constitutes cause. Because "inefficiency, incompetency, or other kindred disqualification" amounts to cause for removal, ineffectiveness in performing duties would justify removal. Id.

Sincerely,



BOB CORBIN
Attorney General

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